THE NEW AND MULTI-FACETED DIMENSIONS OF ARTICLES 5 AND 8 OF THE FEDERAL CONSTITUTION IN THE CONTROL OF ADMINISTRATIVE ACTION

A. Introduction

Of late, administrative law in Malaysia has witnessed a tremendous spurt of judicial activity. A distinct change in judicial policy on matters pertaining to public law may be discerned from the recent decisions. The courts are making a determined and conscious effort to break away from a slavish adherence to the common law in England and looking instead to the constitutional principles enshrined in the Federal Constitution for guidance in resolving disputes between the individual and the administration. In particular, a fresh breath of life has been infused into articles 5 and 8 of the Federal Constitution and both articles have now become important weapons in the artillery of the judiciary to control the abuse of administrative power. The purpose of this paper is to examine the new and multi-faceted dimensions that have been given to articles 5 and 8 of the Federal Constitution.

B. Articles 5(1) and 8(1) as a Doctrinal Basis for Procedural Fairness

The first attempt to revive articles 5 and 8 of the Federal Constitution in preference over common law principles can be perceived in the arena of natural justice. Natural justice is one of the grounds of judicial review invoked by the courts in Malaysia to strike down unlawful administrative action. As natural justice is a creation of common law,[1]

[1] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

traditionally the Malaysian courts have been greatly influenced by developments in the English common law in their application of the principles of natural justice. Recently, the Malaysian courts have begun to formulate a new and different version of natural justice in the guise of procedural fairness.

The seeds of procedural fairness were sown, albeit *obiter*, by Gopal Sri Ram JCA in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors*[2] where his Lordship for the first time put forward the argument that the term *'procedural fairness'* was to be preferred to the *'traditional nomenclature "rules of natural justice"'*[3]. In the subsequent Court of Appeal decision of *Tan Tek Seng v Suruhanjaya Perkhidmatan & Anor*,[4] Gopal Sri Ram JCA took his argument on procedural fairness further to clothe it with a constitutional dimension. The doctrine of procedural fairness, which ensured that a fair procedure is adopted by administrative bodies in each case based on its own facts, was held to be a product of the combined effect of Articles 5(1) and 8(1) of the Federal Constitution. The basis on which this conclusion was arrived at is astounding in its very simplicity. Firstly, the expression 'law' appearing in Articles 5(1) and 8(1) was held to encompass not merely substantive law but also ***'procedure'*** established by law. Secondly, the term 'equality' in Article 8(1) was interpreted to include ***'fairness'*** The combined effect of Articles 5(1) and 8(1) was thus to produce the doctrine of ***'procedural fairness'***.[5]

The foregoing conclusion, albeit simple in terms of rationale, necessitated a new and unprecedented interpretation of Articles 5(1)

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[2](1995) 1 MLJ 308.

[3]*Ibid* at p. 315.

[4](1996) 2 AMR 1617.

[5]In fashioning procedural fairness, Gopal Sri Ram JCA followed the lead in *Maneka Gandhi v Union of India* AIR 1987 SC 597 where the Supreme Court of India had held that the effect of articles 21 and 14 of the Indian Constitution (corresponding with articles 5 and 8 of the Federal Constitution) was to ensure that all administrative action be carried out with procedural fairness.

and 8(1) of the Federal Constitution. In justification of his departure from the earlier views of his brethren,[6] the learned judge remarked:

> **"In my judgment, the courts should keep in tandem with the national ethos when interpreting the provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution..."[7]**

The reception of the doctrine of procedural fairness clearly marks a more progressive era for administrative law in Malaysia. This doctrine enjoys two distinct advantages over and above that of the common law concept of natural justice. Firstly, the doctrine of procedural fairness is clearly wider and more amorphous than natural justice. As early as in *Raja Abdul Malek Muzaffar Shah*, Gopal Sri Ram JCA took pains to emphasize that procedural fairness was *'a concept that includes but is not limited to the rules of natural justice'*[8] and that *'the categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts'*.[9] Then again in the later Court of Appeal decision of *Sugumar*

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[6] In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* (1969) 2 MLJ 129, Suffian FJ (as he then was) had expressed the view that the term 'law' in Art. 5(1) did not include procedure. Further, a more limited construction of Art. 8(1) of the Federal Constitution was favoured in *Dato Harun bin Haji Idris v PP* (1977) 2 MLJ 155 and *Johnson Tan Han Seng v PP* (1977) 2 MLJ 66. The above views may be contrasted with those of Lord Diplock and Lee Hun Hoe CJ (Borneo) in *Ong Ah Chuan v PP* (1981) 1 MLJ 64 and *Re Tan Boon Liat* (1977) 2 MLJ 108 respectively. In *Tan Tek Seng*, Gopal Sri Ram JCA made it clear that he preferred the latter and more progressive views.

[7] *Supra* note 4 at pp. 1653 and 1654.

[8] *Supra* note 3.

[9] *Supra* note 3 at p. 316.

Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor,[10] his Lordship clarified that the doctrine of procedural fairness is not to be equated with that of natural justice. Rather, it was reiterated that although procedural fairness included the rules of natural justice, it nevertheless was wider and encompassed all aspects of fair play in the procedure adopted during a decision-making process.[11] Particularly, the need to abstain from attempting an exhaustive list of what amounts to procedural fairness was emphasized. In this manner, the learned judge deliberately left the doors to procedural fairness open unlike natural justice, which has been always confined to the twin pillars of the right to be heard and the rule against bias.

The recent developments in Malaysia pertaining to the giving of reasoned decisions illustrate with clarity that procedural fairness is wider than natural justice is. In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor*,[12] the Court of Appeal held that procedural fairness imposed a duty on public decision makers to give reasoned decisions. The court, however, restricted the operation of such a duty to situations where a fundamental right enshrined in Part II of the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Two years later, in *Sugumar Balakrishnan*, the Court of Appeal conceded to the criticism[13] that such a restriction was wrong and extended the duty to all cases where the rights of a person are adversely affected by a public law decision.[14] The above ruling on the duty to give a reasoned decision marks a distinct and deliberate departure from common law where it has been consistently held that the rules of natural justice do not require a public decision-maker to provide reasons for his decision.[15]

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[10](1998) 3 MLJ 289.

[11]*Ibid* at p. 326.

[12](1996) 1 MLJ 416.

[13]This criticism was levelled by Professor M. P. Jain in his book titled *M. P. Jain, Administrative Law in Malaysia & Singapore*, 3rd Ed. (1997) at p. 428.

[14]*Supra* note 11.

[15]*Padfield v Minister of Agriculture, Fisheries & Food* (1986) AC 997; *R v Secretary of State for Trade and Industry, ex p. Lonrho plc* (1989) 1 WLR 525; *R v Secretary of State for the Home Department, ex p. Doody* (1993) 3 All ER 92; *R v Civil Service Appeal Board, ex p. Cunningham* (1991) 4 All ER 310; *R v Higher Education Funding Council* (1994) 1 All ER 664.

The second and more important advantage lies in the difference between the doctrinal basis of procedural fairness and natural justice. Natural justice, being a common law concept, may be negated by the express provisions of a statute. On the other hand, procedural fairness, which is pegged to the constitutional tags of Articles 5 and 8, cannot be thus negated. At this juncture, it becomes necessary to revert to the decision in *Sugumar Balakrishnan* where the Court of Appeal was called upon to consider the effect of a statutory provision excluding the right to be heard.

In this case, the appellant, a West Malaysian who had been residing in Sabah since 1975 and practising law thereat since 1985, had applied successfully for an entry pass sometime in December 1995, valid for a period of two years. Some 6 weeks before the expiry of the entry permit, the appellant was served with a notice of cancellation of the entry permit under s. 65(1)(c) of the Immigration Act 1963 ("the Act") and ordered to leave the state within seven days of the said notice. The appellant's application to the High Court for an order of *certiorari* to quash the decision to cancel the entry permit was unsuccessful. On appeal before the Court of Appeal, one of the arguments relied on by the appellant in support of the contention that the decision to cancel the entry permit was invalid was that he had been denied the right to be heard before the decision was taken. The respondents on the other hand, argued that the right to be heard had been expressly excluded by s. 59[16] of the Act. Thus, the interpretation to be given to s. 59 of the Act fell to be considered by the court. In this context, the learned judge took the view that whilst the language of s. 59 of the Act clearly evinced the intention of Parliament to do away with the *audi alteram partem* limb of the rules of natural justice, it did not have the far reaching consequence of excluding other facets of the wider doctrine of procedural fairness, for instance, the duty to give reasons.[17] Accordingly, in the instant case, only the appellant's right to be heard

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[16]S. 59 of the Act reads as follows: *"No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes an order against him in respect of any matter under this Act or any subsidiary legislation made under this Act."*

[17]*Supra* note 10 at p. 325.

was held to have been effectively excluded by s. 59 of the Act and not his right to a reasoned decision.[18]

Strictly speaking, the Court of Appeal in *Sugumar Balakrishnan* has upheld the validity of a statutory provision purporting to exclude the right to be heard. It is interesting, however, to note the pointed remark made by Gopal Sri Ram JCA that the argument that the exclusion of the right to be heard contravened Articles 5 and 8 of the Federal Constitution had not been raised, thereby sparing the court of the task of dealing with such an issue.[19] It is submitted that such an argument, had it been raised, could in all likelihood have succeeded. After all, if the right to be heard is one of the limbs of natural justice and natural justice in turn is part and parcel of the doctrine of procedural fairness as guaranteed by the Federal Constitution, then it follows that s. 59 of the Act is unconstitutional. It is this writer's view that any statutory provision purporting to exclude any facet of procedural fairness, including the right to be heard, is unconstitutional.

From the foregoing, it becomes apparent that by adopting the view that Articles 5(1) and 8(1) of the Federal Constitution house the doctrine of procedural fairness, which includes the added dimension of the right to reasoned decisions, our courts have, in a very brief span of time, succeeded in taking the judicial review of administrative action in Malaysia well beyond that in England. This could never have been achieved had the courts been adamant in its traditional adherence to the common law nomenclature of natural justice. It is unfortunate, however, that the doctrine of procedural fairness has to-date only been endorsed by the Court of Appeal, particularly so in light of the fact that all of the said Court of Appeal decisions have emanated from the same judge.

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[18]The above ruling was merely *obiter* since on the facts of the instant case, the respondents had in fact provided the reasons for the cancellation of the permit in the affidavits filed in court and as such were held by the court not to have breached their duty to give a reasoned decision. Ultimately, the Court of Appeal quashed the decision to cancel the permit, not for failure to comply with procedural fairness but rather on the different ground that the decision to cancel the entry permit had not been substantively fair.

[19]*Supra* note 10 at p. 312.

The opportunity arose for the Federal Court to deliberate on procedural fairness very recently in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*[20]. One of the issues before the Federal Court in this case pivoted on whether a local authority was required to give reasons for resiling from its earlier representations and granting an extension of planning permission subject to an additional condition. In this context, Edgar Joseph Jr. FCJ stated:

> "We ... say that in the *exceptional circumstances* of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council..." (own emphasis)

The learned judge also referred with approval to a number of English authorities on the point and to his earlier decision in *Rohana bte Ariffin & Anor v Universiti Sains Malaysia.*[21] No mention was made by the Federal Court of *Hong Leong Equipment Sdn Bhd, Sugumar Balakrishnan* or Articles 5(1) and 8(1) of the Federal Constitution. The reference to only English authorities and *Rohana bte Ariffin* is a little worrying because neither expounds the duty to give reasons as a general rule. It is also disappointing that the court did not seize the opportunity to premise the duty to give reasoned decisions on a constitutional footing. Ultimately, the general tenor of the judgment of the Federal Court suggests merely that the duty to give reasons arose on the *exceptional circumstances* of the instant case, rather than as a consequence of a general principle of administrative law.[22]

A last point needs to be noted in the context of procedural fairness. Although, the Court of Appeal in *Sugumar Balakrishnan* in essence re-stated the doctrine of procedural fairness put forward earlier in *Tan*

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[20]The decision of the Federal Court was handed down on 26th May 1999 and has not yet been reported at the time of writing this paper.

[21](1989) 1 MLJ 487.

[22]The above decision of Edgar Joseph Jr. FCJ is surprising in the light of his Lordship's approval, albeit *obiter*, of *Tan Tek Seng* in *R. Rama Chandran v The Industrial Court* (1997) 1 MLJ 145.

Tek Seng and *Hong Leong Equipment Sdn Bhd*, it differed in one respect. Whilst the latter cases tagged procedural fairness on to Articles 5(1) and 8(1) of the Federal Constitution, in *Sugumar Balakrishnan*, Article 5(1) appears to have been cast off in the formulation of procedural fairness. In this context, the learned Gopal Sri Ram JCA stated:

> "Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly."[23]

It is unclear whether the reference to only Article 8(1) was deliberate or inadvertent. In any event, it is submitted that by premising procedural fairness solely on Article 8(1), the Court of Appeal in *Sugumar Balakrishnan* has expanded the ambit of the operation of procedural fairness greatly since the difficulties often associated with bringing the alleged infringement within the province of the 'right to life' or 'livelihood' in Article 5(1) no longer arise.

C. Article 8(1) as a Doctrinal Basis for Substantive Fairness

Another recent development has been the judicial trend towards the reception of substantive fairness. The first indication of this trend may be discerned from the Court of Appeal decision of *Tan Tek Seng* although admittedly, the court made no reference to the term 'substantive fairness' as such.[24] However, in *Sugumar Balakrishnan*, the Court of Appeal made it very clear that the duty to be fair as envisaged by Article 8(1) of the Federal Constitution had two separate facets, i.e. procedural fairness as well as substantive fairness. In this context, Gopal Sri Ram JCA stated:

> "The result of the decision in ***Rama Chandran*** and the cases that have followed it is that the duty to act fairly is recognised to comprise of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public

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[23] *Supra* note 10 at p. 320.

[24] Refer to the discussion on substantive fairness by this writer in *"The Changing Faces of Administrative Law in Malaysia"* in (1999) 1 MLJ cxl at p. cxlvi.

> decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance."[25]

Having put forward this view, the court proceeded to test the decision of the respondents to cancel the entry permit of the appellant in the instant case for substantive fairness. In this context, the judge stated:

> "When considering the issue of substantive fairness, the question that falls for determination is whether a reasonable State authority would have directed the cancellation of the appellant's entry permit on the basis of the facts upon which the second respondent acted. Having regard to the objective facts of this case, that question must, in our judgment, receive a negative response."[26]

The principal reasoning given by the court for the negative response is as follows. One of the grounds given for the cancellation of the entry permit had been the low moral fibre of the appellant. The Court of Appeal found as a fact that the respondents had been in possession of materials revealing the purported low morality of the appellant at the time of granting the entry permit. Therefore, even assuming that private morals could constitute a valid ground for the cancellation, it followed that if the existence of such unfavourable information did not prevent the grant of an entry permit in the first place, it was most unreasonable to rely on the very same information to direct a cancellation. In the circumstances, the court held the cancellation of the appellant's entry permit to be substantively unfair and for that reason, null and void and of no effect.

It is respectfully submitted that the decision of the Court of Appeal to adopt substantive fairness as a new ground of judicial review is to

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[25] *Supra* note 10 at p. 323.

[26] *Ibid* at p. 326.

be applauded. By invoking Article 8(1) of the Federal Constitution and clothing the term *"equality"* therein with the meaning of *"fairness"*, the Court of Appeal has introduced the doctrine of substantive fairness into our administrative law jurisprudence, thereby arming the courts with a very useful and effective weapon to strike down unlawful administrative action.

D. Article 8(1) as a Doctrinal Basis for Substantive Legitimate Expectation

The protection of legitimate expectations is a principle fundamental to European Community Law. There are two dimensions to the doctrine of legitimate expectation: one procedural and the other substantive. In its procedural dimension, this doctrine holds that where a public body has led a person legitimately to expect a particular benefit or that a particular procedure will be followed, it is not entitled in law to dash that legitimate expectation without first affording the affected person the opportunity to make representations. Procedural legitimate expectation is today, fully accepted both in English and Malaysian public law as a principle governing the exercise of discretion.[27]

In contrast, where substantive legitimate expectation is relied upon, the affected person is not content to be accorded the mere opportunity to be heard. Rather, he demands the actual substantive benefit which he legitimately expected from the public body. In England, the issue of substantive legitimate expectation has arisen mainly in the context of situations where the public body has laid down some policy and thereafter, at a later date, sought to change the earlier policy. An individual relying on substantive legitimate expectation argues that the public body is bound by the terms of its earlier policy. Such an argument conflicts with the well-entrenched principle of administrative law that the discretion of the administration to formulate and re-formulate

[27] *Schmidt v Secretary of State for Home Affairs* (1969) 2 WLR 337; *Re Liverpool's Taxi Owners' Association* (1972) 2 All ER 589; *Attorney General of Hong Kong v Ng Yuen Shui* (1983) 2 AC 629; *Council of Civil Service Union & Anor v Minister for Civil Service* (1985) AC 374; *JP Berthelsen v Director General of Immigration* (1987) 1 MLJ 134.

policies cannot be fettered.[28] As a result, the question of whether legitimate expectation should be allowed to have a substantive dimension has generated a great deal of controversy in England, resulting in an inevitable cleavage of judicial opinion on the matter. There is the view that legitimate expectation does have a substantive impact.[29] There is also the diametrically opposite view that legitimate expectation is to be confined solely to its procedural dimension.[30] Recently, there have been decisions to the effect that substantive legitimate expectation, rather than being an independent ground of judicial review, merely operates under the "*Wednesbury unreasonableness*" ground.[31]

In Malaysia, several Court of Appeal decisions[32] have indicated the willingness to admit the doctrine of substantive legitimate expectation into the realm of administrative law. The decision of the Court of Appeal in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* went up on appeal and for the very first time, the Federal Court deliberated on the issue of whether legitimate expectation had a substantive impact. The Federal Court after referring to and carefully considering the conflicting judicial opinion in England on this issue endorsed the view that legitimate expectation could have a substantive impact in appropriate cases. Such a progressive view has yet again pointed administrative law in Malaysia towards new horizons.

At this juncture, a comment needs to be made. The Federal Court in this case did not link the doctrine of substantive legitimate expectation to any of the provisions in the Federal Constitution. It is this writer's view, however, that an argument can be made to peg this

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[28] *Southend-on-Sea v Hodgson (Wickford) Ltd* (1962) 1 Q.B. 416; per Lawton J in *Laker Airways Ltd v Dept. of Trade* (1977) Q.B. 643.

[29] *Ex parte Khan* (1985) 1 All ER 40; *Ex parte Ruddock* (1987) 2 All ER 518; *Ex parte M.F.K. Underwriting Agents Ltd* (1990) 1 WLR 1545; *Ex parte Hamble (Offshore) Fisheries Ltd* (1995) 2 All ER 714; *Ex parte Baker* (1995) 1 All ER 73.

[30] *Ex parte Richmond upon Thames* (1994) 1 WLR 74.

[31] *Ex parte Hargreaves* (1997) 1 WLR 906.

[32] *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* (1996) 2 MLJ 697; *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* (1996) 3 MLJ 94; *Ahmad Tajuddin bin Hj. Ishak v Suruhanjaya Pelabuhan Pulau Pinang* (1997) 1 MLJ 241.

doctrine to Article 8(1) of the Federal Constitution for the following reason. The spirit underlying both the doctrine of substantive legitimate expectation and Article 8(1) of the Federal Constitution is in essence one and the same, i.e. the invaluable notion of fairness. *In ex parte Ruddock*, Taylor J remarked that *"the doctrine of legitimate expectation in essence imposes a duty to act fairly"*.[33] Then again, in *ex parte M.F.K. Underwriting Agents Ltd.*, Bingham J stated that *"the doctrine of legitimate expectation is rooted in fairness"*.[34] Article 8(1) of the Federal Constitution is similarly premised on fairness. For instance, in *Tan Tek Seng*, the Court of Appeal referred with approval to the following interpretation of Article 14 of the Indian Constitution (Article 8 of our Federal Constitution) given by the Supreme Court of India in *Maneka Gandhi v Union of India*:

> *"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment..."* (own emphasis)

Further, in *Sugumar Balakrishnan*, the Court of Appeal held that Article 8(1) of the Federal Constitution imposes a duty to act fairly, both in the procedural as well as substantive context.

Thus, if one accedes to the view that Article 8(1) of the Federal Constitution houses the doctrine of substantive fairness, then it should follow logically that the doctrine of substantive legitimate expectation is likewise housed within it. After all, in upholding an individual's substantive legitimate expectation, the court is, in truth, merely requiring a public body to be substantively fair to that individual. It is therefore respectfully submitted that substantive legitimate expectation is an additional facet of Article 8(1) of the Federal Constitution.

E. Article 8(1) as a Doctrinal Basis for Proportionality

The doctrine of proportionality,[35] which emanates from the Continental *droit administratif*, first found its way into Malaysian administra-

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[33](1987) 2 All ER 518 at p. 531.

[34](1990) 1 All ER 91 at p. 111.

[35]For a more detailed discussion on the doctrine of proportionality, refer to the article cited at note 24 at p. cxlviii.

tive law in the Court of Appeal decision of *Tan Tek Seng*. In that case, Gopal Sri Ram JCA held that Articles 5(1) and 8(1) of the Federal Constitution not only ensured a fair procedure but also in addition ensured that a "*fair and just punishment*" is imposed.[36] In the context of what is tantamount to a "*fair and just punishment*", his Lordship referred with express approval to the decision in *Ranjit Thakur v Union of India*[37] wherein the court had ruled that the sentence had to suit the offence and the offender without being so disproportionate as to shock the conscience. Applying the aforesaid principle to the facts in *Tan Tek Seng*, the Court of Appeal held the punishment of dismissal imposed by the Public Services Commission to be disproportionate and substituted the same with an order reducing the rank of the applicant in question.

The decision in *Tan Tek Seng* on the issue of proportionality was applied by the High Court in *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors*[38] and also referred to with approval by Edgar Joseph Jr. FCJ in *R. Rama Chandran*[39]. Unfortunately, the judicial stance on proportionality underwent a metamorphosis in *Ng Hock Cheng v Pengarah Am Penjara & Ors*[40] where the Federal Court was called upon to deliberate on the question of law whether the High Court had the jurisdiction or power to vary any penalty imposed by the Public Services Commission (PSC). The Federal Court unanimously answered this question in the negative. The court held that whilst the High Court had the jurisdiction to intervene on the nature and manner of an accusation brought by the PSC against a public officer, it did not have the additional jurisdiction to review the punishment decided upon by the PSC. Thus, in the narrow context of reviewing punishment, the Federal Court overruled the majority judgment in *Tan Tek Seng*. It is pertinent to note that the Federal Court did not specifically refer to the doctrine of proportionality as such. However, the cumulative effect of the ruling of the Federal Court in

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[36] *Supra* note 4 at p. 1655.

[37] AIR 1987 SC 2386.

[38] (1997) 2 MLJ 454.

[39] *Supra* note 22 at pp. 189 and 190.

[40] (1998) 1 MLJ 153.

Ng Hock Cheng that there can be no review of punishment and the express overruling of *Tan Tek Seng* on the same narrow point of law, is that there appears to be no room for the operation of the doctrine of proportionality as envisaged by the Court of Appeal in *Tan Tek Seng*. Ironically enough, the court did not refer to the earlier Federal Court decision in *R. Rama Chandran* where *Tan Tek Seng* and the proportionality principle had been cited with approval by Edgar Joseph Jr. FCJ. Be that as it may, the fact remains that the approval of the Federal Court in *R. Rama Chandran* was merely *obiter* as opposed to the *ratio* in *Ng Hock Cheng*.

Some seven months later, the Court of Appeal in *Sugumar Balakrishnan,* attempted to revive the doctrine of proportionality without making any reference to the decision in *Ng Hock Cheng*. Of particular relevance are the following remarks made by Gopal Sri Ram JCA:

> "The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struckdown if it is found to be unfair in substance."[41]

The above remarks suggest that although a decision to punish is taken in a manner which is procedurally fair, if the punishment in itself is disproportionate, it would be unfair in substance and liable to be set aside. Thus, in direct conflict with the ruling in *Ng Hock Cheng,* the Court of Appeal in *Sugumar Balakrishnan* has revived the doctrine of proportionality under the umbrella of substantive fairness. The decision of the Court of Appeal in *Sugumar Balakrishnan* is pending appeal to the Federal Court and it remains to be seen if and how, the issues of substantive fairness and proportionality will be viewed by the Federal Court.[42] In the event that the Court of Appeal's ruling on proportion-

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[41] *Supra* note 25.

[42] Refer to the article cited in note 24 at p. cl for arguments as to why the decision in *Ng Hock Cheng* may be distinguished.

ality in *Sugumar Balakrishnan* is upheld by the Federal Court, the proportionality principle can be taken to be housed within Article 8(1) of the Federal Constitution.

Recently, the Federal Court in *Syarikat Bekerjasam-Sama Serbaguna Sungai Gelugor* relied on the proportionality principle as one of the grounds to quash the extension of planning permission granted by a local authority. The court expressed the view that the condition subject to which the extension had been granted was severe and *"out of all proportion to extension of planning permission sought"*.[43]

It is important to note, however, that the Federal Court refrained from making any ruling on the application of the doctrine of proportionality as a general principle governing the exercise of discretion by all public bodies. Neither did the court make any reference to *Tan Tek Seng*, *Sugumar Balakrishnan* or *Ng Hock Cheng*. Rather, the general tenor of the judgment suggests that the ruling on the application of the proportionality principle was made only in the context of planning permissions granted by the local authority. However, it is submitted that the fact that the Federal Court appeared to countenance the proportionality principle in planning cases indicates that the ruling in *Ng Hock Cheng* is confined to the reviewing of punishment meted out by the PSC to public officers. Thus, there is now room for the argument that the proportionality principle may be invoked to review decisions of public bodies other than the PSC. It is further submitted that the view of Gopal Sri Ram JCA in *Sugumar Balakrishnan* that the proportionality principle is one of the facets of Article 8(1) of the Federal Constitution should be followed.[44]

F. Article 8(1) as a Basis for a New Version of Unreasonableness

One of the most significant aspects of *Tan Tek Seng* is the new dimension that has been given to the equality provision in Article 8(1) of the Federal Constitution. The Court of Appeal, following the interpreta-

[43] At p. 126 of the written judgment handed down on 26th May 1999.

[44] *Supra* note 42.

tion given by the Indian Supreme Court in *Maneka Gandhi* on Article 14(1) of the Indian Constitution, held that the principle of reasonableness is an essential element of the equality provision in Article 8(1) of the Federal Constitution.[45] In *Sugumar Balakrishnan*, Gopal Sri Ram JCA reiterated that in order to meet the required standard of substantive fairness in Article 8(1) of the Federal Constitution, the decision had to be "*reasonable*"[46]. The term "*reasonable*" in both the aforesaid cases has been used in a somewhat different context as compared to "Wednesbury unreasonableness". Whilst the definition of what constitutes unreasonableness in the Wednesbury sense is set very high,[47] the principle of reasonableness implicit within Article 8(1) appears to be more flexible. It is respectfully submitted that the principle of reasonableness which is implicit in Article 8(1) of the Federal Constitution will be far more effective than Wednesbury unreasonableness as a tool to curtail administrative excesses. Given the current judicial philosophy of developing a distinct and separate Malaysian jurisprudence on administrative law, there is no reason why the common law test of "Wednesbury unreasonableness" cannot be discarded in favour of the principle of reasonableness contained in Article 8(1) of the Federal Constitution.

G. Article 5(1) and the Right to Livelihood

Traditionally, the term "right to life" in Article 5(1) of the Federal Constitution has been interpreted restrictively. In departure from this

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[45] The Supreme Court in this case had stated that *"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits...Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence..."*.

[46] *Supra* note 42.

[47] *Associated Picture House Ltd v Wednesbury Corp.* (1948) 1 KB 223 at p. 230 where Lord Greene MR outlined the test as *'something so absurd that no reasonable or sensible person could have come to that decision'*. His Lordship also stressed that *'to prove a case of that kind would require something overwhelming'*.

tradition, the Court of Appeal in *Tan Tek Seng* proceeded to clothe Article 5(1) with a significantly wider and far-reaching interpretation.[48] In this context, Gopal Sri Ram JCA stated:

> "Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure."[49]

In *Tan Tek Seng*, the ruling that the right to life in Article 5(1) encompassed the right to livelihood was made in the context of employment in the public sector. Subsequently, in *Hong Leong Equipment Sdn Bhd*, the Court of Appeal had occasion to consider the operation of Article 5(1) in the context of employment in the private sector and the discretion of the Minister of Human Resources to refer dismissals to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ("the Act"). Once again, in no uncertain terms, the court held employment to be a fundamental right within the meaning of Article 5(1). This interpretation enabled the court to hold that the Minister of Human Resources was required to mete out procedural fairness when exercising his discretion under s. 20(3) of the Act, which on the facts of the instant case, included the duty on his part to give a reasoned decision.

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[48] The court followed the views in the following Indian Supreme Court decisions: *Kharak Singh v State of Uttar Pradesh Air* 1963 SC 1295; *Bandhua Mukti Morcha v Union of India Air* 1984 SC 802; *Olga Tellis v Bombay Municipal Corporation Air* 1986 SC 180; *Delhi Transport Corporation v DTC Madzoor Congress & Ors* (1991) Supp 1 SCC 600.

[49] *Supra* note 4 at p. 1654.

It is submitted that this new interpretation conferred upon Article 5(1) is invaluable in the protection of the employee, both in the private and public sector and reflects the recent, determined judicial effort to uphold the Federal Constitution as a living and vital document.

H. Article 5(1) and the Right of Access to the Court

A common feature of the statutory framework in Malaysia is the inclusion of a variety of ouster clauses designed to exclude or qualify the judicial review of administrative action. The courts in Malaysia have generally viewed ouster clauses as inimical and an unacceptable impingement of their inherent supervisory jurisdiction. The decisions of the Court of Appeal and Federal Court in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union*[50] and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia*[51] respectively are clear illustrations of the judicial abhorrence of ouster clauses. The above cases have negated the efficacy of ouster clauses to a great extent by their ruling that errors of law fall within the ambit of jurisdictional errors and that consequently, ouster clauses are ineffective to prevent judicial review of decisions made in error of law.

A decision, which is of particular significance in the context of ouster clauses, is that of the Court of Appeal in *Sugumar Balakrishnan*. In this case, the court classified the liberty of the individual to go to court and seek judicial review of administrative action as one of the facets of personal liberty guaranteed by Article 5(1) of the Federal Constitution. Such an interpretation is unprecedented and clearly depicts the new judicial trend in Malaysia of invoking the provisions of the Federal Constitution, not only to curb the abuse of administrative power, but also to prevent any whittling of the scope of judicial review. As has been mentioned earlier, the decision of the Court of Appeal has gone up on appeal and it remains to be seen how the Federal Court will view the operation of Article 5(1) in the context of ouster clauses. At this juncture, it is pertinent to note that the recent decision of the Federal Court in *Syarikat Bekerjasama-Sama Serbaguna*

[50](1995) 2 MLJ 336.

[51](1995) 3 MLJ 369.

Sungai Gelugor has re-affirmed the law on ouster clauses as stated in *Syarikat Kenderaan Melayu Kelantan Bhd*, although no reference was made to Article 5(1) of the Federal Constitution.

I. Article 5(2) and the Remedy of Habeas Corpus

In a number of decisions in the previous year, the High Court was called upon to determine whether the remedy of habeas corpus or *certiorari* was appropriate in respect of challenging an order of detention made by a Magistrate under s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (hereafter referred to as "the Act"). In *Mohd Shahriman Mohd Khairil v PP & Anor*,[52] *Mohd Faizol bin Mohammad v Magistrate, Magistrate's Court Kulim*,[53] *Tg Mohd Shahrizal Tg Zainal Abidin v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*[54] *and Sazali Mat Noh v Timbalan Menteri Dalam Negeri, Malaysia*,[55] the preliminary objection that *certiorari* and not habeas corpus was the appropriate remedy was rejected by the High Court. The essence of the decisions in all four cases was that Article 5(2) of the Federal Constitution took precedence over other statutes vesting the High Court with the power to issue the writ of habeas corpus and thereby conferred a detainee with the constitutional remedy of habeas corpus whenever the detention is not carried out in accordance with the procedures established by law.[56] Thus, in all of the afore-

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[52] (1998) 2 CLJ 855.

[53] (1998) 4 MLJ 442.

[54] (1998) 4 CLJ 468.

[55] (1998) 4 CLJ 460.

[56] A completely diametrical view was taken in *Ahmad Bashid Abdul Malek & Yang Lain v Timbalan Menteri Dalam Negeri Malaysia & Yang Lain* (1998) 2 CLJ 457 and *Mohd Shaipul Nizam Ahmad v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* (1998) 2 CLJ 875. In all of these cases, the High Court upheld the preliminary objection that *certiorari* and not habeas corpus was the appropriate remedy to be sought where a detention order made by a magistrate under the Act is challenged. Two principal reasons were given in support of such a view. Firstly, the constitutional remedy of habeas corpus under Article 5(2) of the Federal Constitution only availed a person who had been "unlawfully detained" and a person who had been detained pursuant to an order made by a magistrate under the Act could not be regarded as

said cases, it was held that where the order of the magistrate is made without due compliance with the procedures outlined in s. 6(1)(b) of the Act, the detention is unlawful within the meaning of Article 5(2) of the Federal Constitution, entitling the detainee to immediately apply for a writ of habeas corpus without resorting to the more tedious remedy of *certiorari*.[57] In rejecting the preliminary objection in *Mohd Faizol bin Mohamad*, Mohd Hishamudin J remarked:

> "If I were to accept this submission, it would be tantamount to this court taking a step backwards in terms of protecting the liberty of the subjects of this nation. The efficacy of the writ of habeas corpus would be seriously impaired. It would be a radical departure from the existing principles on habeas corpus."[58]

It is submitted that the decisions in the above-mentioned four cases are correct. The decision of the Court of Appeal in *Tan Tek Seng* is sufficient authority for the proposition that the term "***law***" in Article 5 of the Federal Constitution is inclusive of "***procedure established by law***". There is no denying that a detention which does not comply with the procedures established by law is unlawful, thereby falling squarely within the province of Article 5(2) of the Federal Constitution and rendering habeas corpus the appropriate remedy to secure the release of the detainee from such unlawful detention.

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being unlawfully detained. Secondly, there is a distinction between an order of detention made by a magistrate under the Act and one made by the executive under preventive detention laws. The learned judge took the view that whilst an order of habeas corpus served to automatically quash or vitiate a detention order made by the executive, a detention order made by the magistrate under the Act could only be quashed or vitiated by a specific order to that effect made by a superior court either in appeal or review proceedings by way of *certiorari*. It is submitted that this view is wrong and should not be followed.

[57] The orders of detention made by the respective magistrates in all four cases were found to contain procedural defects rendering the detentions unlawful and necessitating the issue of the writ of habeas corpus.

[58] *Supra* note 53 at p. 446.

The High Court in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor*[59] adopted a similar liberal construction of Article 5(2) when considering the propriety of issuing a writ of habeas corpus under the said article, albeit in a slightly different context than in the cases mentioned above. In this case, the applicant who had been convicted and sentenced to six months imprisonment by the Sessions Court for an act of gross indecency under s. 377D of the Penal Code ("the Code") applied for a writ of habeas corpus on the ground that the Sessions Court had no jurisdiction to hear, convict and sentence the applicant by virtue of Article 121(1A) of the Federal Constitution read with the Syariah Criminal Offences (Federal Territories) Act 1997, both parties to the offence being Muslims. A preliminary objection was raised by the senior deputy prosecutor that the issue of the jurisdiction of the Sessions Court should be dealt with by way of appeal or revision under the Criminal Procedure Code (CPC) and not by way of a writ of habeas corpus. In rejecting the preliminary objection that habeas corpus was not the appropriate remedy in the instant case, Abdul Wahab J stated:

> "The court would be taking a major step backwards contrary to the letter and spirit of art 5 of the Constitution if it were to accept the preliminary objection and order the applicant to rely on appeal procedure alone in this case."[60]

The decisions of the High Court in the above cases once again reflect the current judicial policy of interpreting the provisions of the Federal Constitution in a dynamic manner and is welcome.

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[59] (1998) 4 MLJ 742.

[60] *Ibid* at p. 751. The decision of the High Court was reversed by the Court of Appeal [1999] 1 MLJ 266. The Court of Appeal held that the expressions 'unlawfully detained' and 'detention' in Art. 5(2) of the Federal Constituion do not apply to the case of a person held in a prison in execution of a sentence passed by a court of competent jurisdiction. The decision of the Court of Appeal was affirmed by the Federal Court [1999] 2 MLJ 241.

J. Conclusion

The foregoing reveals the new and multi-faceted dimensions that have been given to Articles 5 and 8 of the Federal Constitution. All of the interpretations are admittedly unprecedented in Malaysia, yet justifiable if one accepts the view that the interpretation of the Federal Constitution, which is the supreme law of the land, cannot be equated with that of a mere statute. The winds of change, carrying with it the conferment of new and vast powers on the administration, necessitate an equally new and strengthened judicial resolve to control the exercise of these powers. There is no better way for the judiciary to do so than to infuse new life into the provisions of the Federal Constitution and to invoke the same to combat the abuse of administrative power. It has been remarked that *"the spirit of constitutionalism must be impressed on the hearts and minds of our political masters.'*[61] That this spirit lives in the hearts and minds of the judiciary is encouraging and augurs well for the future of administrative law in Malaysia.

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[61] Dato' Param Cumaraswamy, "Role of the Executive" referred to in Lee, H. P. in *"Constitutional Conflicts in Contemporary Malaysia"*, Oxford University Press (Kuala Lumpur), 1995, p. 100.

CONTRIBUTORY NEGLIGENCE IN FATAL ACCIDENT CLAIMS

A bane of our modern society, and a matter which causes considerable concern and anxiety, is the ever increasing number of fatal accidents, particularly fatal accidents from motor vehicle collisions.[1]

Where the death of a person is caused by the wrongful act of another, two types of actions may arise. First the deceased's personal representative may sue the wrong-doer for damages in respect of the wrong committed against the deceased. The action, traditionally called an "estate claim", is based on section 8 of the Civil Law Act 1956. Section 8 has its origins in the (United Kingdom) Law Reform (Miscellaneous Provisions) Act 1934. By virtue of section 8(1) of the Malaysian Act, on the death of a person all causes of action except defamation, seduction, inducing one spouse to leave or remain apart from the other and damages for adultery, survive for the benefit of his estate. Section 8(2) regulates the damages recoverable for the benefit of the estate.

The second type of action that may be brought is a claim by the dependants of the deceased[2], who may sue the wrongdoer for damages in respect of the pecuniary support which they had lost in consequence of the deceased's death, an action which is traditionally called a "dependency claim" in Malaysia. The dependency claim is regulated by section 7 of the Civil Law Act 1956. Section 7 has its origins in the

[1] Malaysia intends to amend its Road Transport Act 1987 to provide for a mandatory jail sentence for persons causing death by reckless driving. See "The Star" 9 November 1998, p. 3.

[2] Sections 7(2) and 7(11) of the Civil Law Act 1956 explain the meaning of the expression "dependants of the deceased".